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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1045

CARL WHORTON, KEN WHORTON, et al.,
Petitioners,

vs.

SURTRAN TAXICABS, INC., YELLOW CAB OF DALLAS, INC.,
FORT WORTH CAB & BAGGAGE CO., INC.,
CITY OF DALLAS, TEXAS, CITY OF FORT WORTH, TEXAS,
CITY OF IRVING, TEXAS, CITY OF GRAPEVINE, TEXAS,
Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals for The Fifth Circuit

JOINT BRIEF OF RESPONDENTS CITIES OF DALLAS AND FORT WORTH IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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**On Petition for a Writ of Certiorari to
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JOINT BRIEF OF RESPONDENTS CITIES OF DALLAS AND FORT WORTH IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents, the Cities of Dallas and Fort Worth, Texas respectfully pray that the petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the proceeding entitled, *Woolen, et al. v. Surtran Taxicabs, Inc., et al.* on September 26, 1986, be denied.

STATUTES INVOLVED

In addition to the state statutes cited by Petitioners, Respondents would add:

(1) Sections 20 and 21, Tex.Rev.Civ.Stat.Ann. art. 1175 (Vernon 1969), Texas Home-Rule Statute; and

(2) Tex.Rev.Civ.Stat.Ann. art. 46d-14 (Vernon 1969), Texas Municipal Airport Act (herein referred to as "Act" or "art. 46d-14").

Relevant portions appear in the Appendix.

STATEMENT OF THE CASE

Respondents are satisfied with Petitioners' statement of the case, with the following additions:

First, the Trial Court's opinion dismissing the municipal defendants was grounded upon art. 46d-14, as it existed in 1969, which authorized the municipal defendants to exercise their home-rule powers at a regional airport through a joint airport board. This Act sufficed as the requisite "clear articulation of a state policy to displace competition."

Second, the Trial Court's decision was not premised on a "retroactive validation" of Respondents' actions, as Petitioners claim.

Third, the Dallas-Fort Worth Regional Airport is not "located outside the city limits of both cities," as Petitioners claim. It is located in part within the city limits of Fort Worth, Texas.

SUMMARY OF ARGUMENTS

The issues raised by Petitioners have wholly failed to raise a question needing resolution by this Court.

First, Petitioners argue that "a clearly articulated and affirmatively expressed state policy" must be established by a pre-existing state statute. (Pet. 6-7). Art. 46d-14 satisfies this requirement. Therefore, Petitioners are merely requesting this Court to reconsider the same issue that it decided in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 85 L.Ed.2d 24, 105 S.Ct. 1713 (1985). The Fifth Circuit applied the *Town of Hallie* test of foreseeability to art. 46d-14 and held that the potentially anticompetitive state policy can reasonably be inferred from the state's broad grant of authority over airport management to municipalities. *Independent Taxicab Drivers Employees v. Greater Houston Transportation Company*, 760 F.2d 607, 610-611, *cert. den.*, 106 S.Ct. 231 (1985). In the present case, the District Court applied and followed *Independent Taxicab*. (615 F.Supp., at 346-47).

Petitioners next argue that the Local Government Antitrust Act ("LGAA") does not permit a federal court to consider alternative remedies against private defendants as grounds for retroactive application of the LGAA. (Pet. 15-16). This argument is not supported in law. The LGAA dictates that it be applied "in light of all the circumstances." 15 U.S.C. § 35(3)(b). Furthermore, Petitioners' argument was neither briefed nor argued before the Court of Appeals; therefore, it was not properly preserved for review by this Court.[1] Finally, the District Court's dismissal of the municipal defendants under the LGAA was decided on grounds independent of state-action immunity.

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[1]See e.g. *EEOC v. FLRA*, 476 U.S. ____, 90 L.Ed.2d 19, 24, 106 S.Ct. 1678 (1986); *Husty v. United States*, 282 U.S. 694, 701-702, 75 L.Ed 629, 633, 51 S.Ct. 240 (1931); *Duignan v. United States*, 274 U.S. 195, 200, 71 L.Ed. 996, 1000, 47 S.Ct. 566 (1927); *Kremp v. Dodds*, 775 F.2d 1319, 1321 n.2 (5th Cir. 1985); *Franceski v. Plaquemines Parish School Bd.*, 772 F.2d 197, 199 (5th Cir. 1985).

REASONS FOR DENYING THE PETITION

I. IN DETERMINING WHETHER STATE POLICY EXISTED TO AUTHORIZE THE MUNICIPAL DEFENDANTS TO GRANT A SINGLE TAXICAB FRANCHISE AT THE AIRPORT, THE DISTRICT COURT APPLIED THE PROSPECTIVE TEST URGED BY PETITIONERS.

A. State policy existed prior to the municipal defendants' activity. Tex.Rev.Civ.Stat.Ann. art. 46d-14 (Vernon 1969).

Petitioners first argue that a *post hoc* validating statute is insufficient to "clearly articulate and affirmatively express" a state policy in favor of municipal regulations as required by *Town of Hallie.* (Pet. 6-7). However, in *Independent Taxicab,* the Fifth Circuit did not rely on a *post hoc* validating statute but held that the 1947 provision of art. 46d-14 is

> "a strong indication of the states' desire to abdicate in favor of municipal prescience with regard to airport management. . . . [A] decision to confer the privilege of airport taxicab operation on a single company . . . is a logical and reasonable consequence of the state's broad allocation of authority,"

(615 F.Supp., at 347).

Petitioners seek to distinguish *Independent Taxicab* because Houston wholly owns and operates its airport, while in the instant case, the cities of Dallas and Fort Worth jointly own and operate their regional airport. Nonetheless, the District Court properly applied *Independent Taxicab* because art. 46d-14(b) authorized the cities to jointly acquire, own, and operate municipal airports. (615 F.Supp., at 347-48).

> "... [A]ny two or more municipalities are specially authorized to make such agreement or agreements as they may deem necessary for the joint acquisition and operation of airports..."

Art. 46d-14(b).

The same statutory authority existed for both Houston and the cities of Dallas and Fort Worth. Therefore, Petitioners' argument must fail.

Consistent with the Fifth Circuit's *Independent Taxicab* decision, and similar decisions of the other circuits,[2] the District Court faithfully applied the *Town of Hallie* standard that Petitioners now urge. The relief requested has already been granted by both the District Court and the Court of Appeals.

Further review is unnecessary.

B. The Amendments to the Municipal Airports Act are irrelevant to the District Court's dismissal under the state-action immunity defense.

In a further attempt to distinguish *Independent Taxicab*, Petitioners argue that prior to 1983, no governmental entity had any power to regulate taxicab service at the Dallas-Fort Worth Regional Airport, because it was jointly owned. (615 F.Supp., at 348) In rejecting Petitioners' contentions, the District Court regarded the 1983 amendment to art. 46d-14 as an "adequate indication of the state's desire to allow

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[2]See e.g., *Cine 42nd Street Theatre Corp v. Nederlander Org.*, 790 F.2d 1032 (2nd Cir. 1986); *LaSalle Nat. Bank of Chicago v. County of DuPage*, 777 F.2d 377, 381 (7th Cir. 1985) *cert. den.*, 106 S.Ct. 2892 (1986); *Mercy-Peninsula Ambulance v. San Mateo County*, 791 F.2d 755, 757 (9th Cir. 1986); *Grason Elec. v. Sacramento Mun. Utility Dist.*, 770 F.2d 833, 836 (9th Cir. 1985), *cert. den.*, 106 S.Ct. 886 (1986); *Auton v. Dade City, Florida*, 783 F.2d 1009, 1011 (11th Cir. 1986); *L&H Sanitation v. Lake City Sanitation*, 769 F.2d 517, 520 (8th Cir. 1985); *Mass. Furniture & Piano Movers Ass'n v. F.T.C.*, 773 F.2d 391, 396 (1st Cir. 1985).

joint airports to displace competition." (615 F.Supp., at 349). Nowhere in the opinion does the Court indicate a reliance upon the Act for retroactive validation as Petitioners contend. Instead the District Court relied upon art. 46d-14, (Vernon 1969) as providing the necessary anticompetitive state policy. The Court did not adopt a "retrospective rule." (615 F.Supp., at 347-48). Therefore, review of this issue is unwarranted and unnecessary.

II. IN CONSIDERING RETROACTIVE IMMUNITY, THIS COURT NEED NOT DETERMINE WHETHER THE LOCAL GOVERNMENT ANTITRUST ACT PROHIBITS THE LOWER COURT FROM WEIGHING THE EXISTENCE OF ALTERNATIVE RELIEF AGAINST PRIVATE DEFENDANTS.

Petitioners, for the first time, argue that the Fifth Circuit erred when it dismissed the municipal defendants by weighing the alternative relief against private defendants. (Pet. 15-16). Petitioners now request that the Court fashion an appropriate equitable remedy against the municipal defendants as an equitable *condition* of the retroactive application of the LGAA. (Pet. 18, emphasis added). This Court should decline review for three reasons.

A. Petitioners failed to brief or argue this issue before the Court of Appeals.

It is elementary that a point of error is waived if not raised at either the District Court or Appellate Court. It cannot be raised for the first time on appeal to the United States Supreme Court.[3] The sole reference to Petitioners'

[3]Note 1, supra.

LGAA equity argument is on page 24 of Whorton's Reply Brief in the Fifth Circuit wherein he argues that:

> "3. A dismissal without remedy under the Local Government Antitrust Immunity Act of 1984 requires an equity trial of fact in order to apply equitable principles mandated by the Act. . . ."

This is the first and only reference made prior to the filing of the petition for writ of certiorari. Consequently, this point was not preserved for review.

B. The retroactive application of the LGAA immunity defense was expressly decided on additional independent grounds.

The District Court considered the impact of the LGAA (independent of the State-action immunity and *Noerr-Pennington* defenses) and stated in its opinion that:

> The second question before the Court is whether the plaintiff's claims for damages, interest on damages, costs and attorney's fees against the cities should, *in the alternative,* be dismissed under § 3 of the Local Government Antitrust Act of 1984.

(615 F.Supp., at 350, emphasis added).

C. The District Court properly dismissed the municipal defendants.

Even if review is deemed appropriate by this Court, the trial court's decision to dismiss was entirely correct.

The LGAA may be applied retroactively if,

> "the Defendant establishes and the Court determines, in light of all the circumstances, including the stage of the litigation and the availability of relief under the Clayton Act that it would be inequitable not to apply this subsection to a pending case, . . ."

15 U.S.C. § 35(3)(b).

Following the dictates of the LGAA, the District Court determined, in light of all the circumstances, that it would be inequitable not to apply § 3(a) of the LGAA in the instant case. (615 F.Supp., at 353). Despite the clear statutory language, Petitioners argue that the trial court could not consider alternative relief against private defendants. (Pet. 15-16).

The plain meaning of statutory language takes precedence in determining congressional intent. See e.g. *Rubin v. United States,* 449 U.S. 424, 430, 66 L.Ed.2d 633, 638, 101 S.Ct. 698 (1981) and the cases cited therein. Moreover, Petitioners' interpretation of the LGAA finds no support in the *Wetzel* case. (Pet. 18). *Wetzel* is a Title VII case concerned not with the LGAA, but with class action relief under Fed.R.Civ.P., Rules 23(b)(2) and 23(b)(3).

Petitioners' "alternative relief" argument is without merit.

CONCLUSION

The Petition for Certiorari raises no issue of significance to indicate that the lower court's decision to dismiss was improper. Dismissal of the municipal defendants was based upon both state-action immunity and the LGAA defenses. (615 F.Supp., at 349, 353). Even if one of Petitioners' points were meritorious, this Court must still uphold the trial court's ruling on the alternative grounds cited in the opinion.

For the reasons stated, Respondents respectfully pray that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On the 24th day of February, 1987, copies of this Joint Brief in Opposition were delivered to all Counsel of Record, in accordance with Sup. Ct. R. 28.3.

By: _____
DAVID J. LABREC

APPENDIX

Appendix

STATE STATUTES

Reprinted here are the pertinent sections of the relevant state statutes which were not included with the Petition for Writ of Certiorari.

1. Texas Home-Rule Statute,
TEX.REV.CIV.STAT.ANN.
art. 1175, §§ 20 and 21 (Vernon 1963) 2a

2. Texas Municipal Airports Act,
TEX.REV.CIV.STAT.ANN.
art. 46d-14 (Vernon 1969) 2a

3. Texas Municipal Airports Act,
TEX.REV.CIV.STAT.ANN.
art. 46d-14 (Vernon Supp. 1986) 6a

Texas Home Rule Statute

TEX.REV.CIV.STAT.ANN. art. 1175 §§ 20 and 21 (Vernon 1963)

> Cities adopting the charter or amendment hereunder shall have full power of local self-government, and among the other powers that may be exercised by any such city the following are hereby enumerated for greater certainty:
>
> • • •

20. To license, operate and control the operation of all character of vehicles using the public streets, including motorcycles, automobiles, or like vehicles, and to prescribe the speed of the same, the qualification of the operator of the same, and the lighting of the same by night and to provide for giving bond or other security for the operation of the same.

21. To regulate, license and fix the charges or fares made by any person owning, operating or controlling any vehicle of any character used for the carrying of passengers for hire or the transportation of freight for hire on the public streets and alleys of the city.

Texas Municipal Airports Act (In Effect During The Period 1974-1981)

Art. 46d—14. Joint Operations

(a) Authorization. For the purposes of this Section, unless otherwise qualified, the term "public agency" includes municipality, as defined in the Act[1], any agency of the State government and of the United States, and any municipality, political subdivision and agency of another State; and the term "governing body" means the governing body of a county or municipality, and the head of the agency if the public agency is other than a county or municipality. All powers, privileges and authority granted to any municipality by this Act may be exercised and enjoyed jointly with

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[1]Articles 46d-1 to 46d-22

any public agency of any other State or of the United States to the extent that the laws of such other State or of the government, when acting jointly with any municipality, may exercise and enjoy all of the powers, privileges and authority conferred by this Act upon a municipality.

(b) Agreement. Any two (2) or more public agencies may enter into agreements with each other for joint action pursuant to the provisions of this Act and any two (2) or more municipalities are specially authorized to make such agreement or agreements as they may deem necessary for the joint acquisition and operation of airports and air navigation facilities. Concurrent action by ordinance, resolution or otherwise of the governing bodies of the participating public agencies shall constitute joint action. Each such agreement shall specify its duration, the proportionate interest which each public agency shall have in the property, facilities and privileges involved, the proportion to be borne by each public agency of preliminary costs and costs of acquisition, establishment, construction, enlargement, improvement, and equipment of the airport or air navigation facility, the proportion of the expenses of maintenance, operation, regulation and protection thereof to be borne by each and such other terms as are required by the provisions of this Section. The agreement may also provide for: amendments thereof, and conditions and methods of termination of the agreement; the disposal of all or any of the property, facilities and privileges jointly owned, prior to or upon said property, facilities and privileges, or any part thereof, ceasing to be used for the purposes provided in this Act, or upon termination of the agreement; the distribution of the proceeds received upon any such disposal, and of any funds or other property jointly owned and undisposed of; the assumption or payment of any indebtedness arising from the joint venture which remains unpaid upon the disposal of all assets or upon a termination of the agreement; and such other provisions as may be necessary or convenient.

(c) Joint Board. Public agencies acting jointly pursuant to this Section shall create a joint board which shall consist of members appointed by the governing body of each partici-

pating public agency. The number to be appointed, their term and compensation, if any, shall be provided for in the joint agreement. Each such joint board shall organize, select officers for terms to be fixed by the agreement, and adopt and amend from time to time rules for its own procedure. The joint board shall have power to plan, acquire, establish, develop, construct, enlarge, improve, maintain, equip, operate, regulate, protect and police any airport or air navigation facility or airport hazard to be jointly acquired, controlled and operated, and such board may exercise on behalf of its constituent public agencies all the powers of each with respect to such airport, air navigation facility or airport hazard, subject to the limitations of Subsection (d) of this Section.

(d) Limitations on Joint Board

(1) Expenditures. The total expenditures to be made by the joint board for any purpose in any calendar year shall be determined by a budget approved by the governing bodies of its constituent public agencies on or before the preceding December 1st.

(2) Acquisitions Beyond Sums Allotted. No airport, air navigation facility, airport hazard, or real or personal property, the cost of which is in excess of sums therefor fixed by the joint agreement or allotted in the annual budget, may be acquired by the joint board without the approval of the governing bodies of its constituent public agencies.

(3) Eminent Domain. Eminent domain proceedings under this Section may be instituted only by authority of the governing bodies of the constituent public agencies of the joint board. If so authorized, such proceedings shall be instituted in the names of the constituent public agencies jointly, and the property so acquired shall be held by said public agencies as tenants in common until conveyed by them to the joint board.

(4) Disposal of Real Property. The joint board shall not dispose of any airport, air navigation facility or real property under its jurisdiction except with the consent of the

governing bodies of its constituent public agencies, provided that the joint board may, without such consent, enter into the contract, lease or other arrangements contemplated by Section 4 of this Act.[2]

(5) Police Regulations. Any resolution, rules, regulations, or orders of the joint board dealing with subjects authorized by Section 7 of this Act[3] shall become effective only upon approval of the governing bodies of the constituent public agencies provided that upon such approval, the resolutions, rules, regulations or order of the joint board shall have the same force and effect in the territories or jurisdictions involved as the ordinance, resolutions, rules, regulations or order of each public agency would have in its own territory or jurisdiction.

(e) Joint Fund. For the purpose of providing a joint board with moneys for the necessary expenditures in carrying out the provisions of this Section, a joint fund shall be created and maintained, into which shall be deposited the share of each of the constituent public agencies as provided by the joint agreement. Each of the constituent public agencies shall provide its share of the fund from sources available to each. Any Federal, State or other contributions or loans, and the revenues obtained from the joint ownership, control and operation of any airport or air navigation facility under the jurisdiction of the joint board shall be paid into the joint fund. Disbursements from such fund shall be made by order of the board, subject to the limitations prescribed in Subsection (d) of this Section.

Acts 1947, 50th Leg., p. 188, ch. 114, § 14.

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[2]Article 46d-4
[3]Article 46d-7

Texas Municipal Airports Act
(As Amended, 1985)

Art. 46d—14. Joint Operations

(a) Authorization. For the purposes of this Section, unless otherwise qualified, the term "public agency" includes municipality, as defined in this Act, any agency of the State government and of the United States, and any municipality, political subdivision and agency of another State; and the term "governing body" means the governing body of a county or municipality, and the term "airport hazard area" means any area of land or water upon which an airport hazard might be established if not prevented as provided in this Act. All powers, privileges and authority granted to any municipality by this Act may be exercised and enjoyed jointly with any public agency of any other State of the United States to the extent that the laws of such other State of the United States permit such joint exercise or enjoyment. If not otherwise authorized by law, any agency of the State government when acting jointly with any municipality, may exercise and enjoy all of the powers, privileges and authority conferred by this Act upon a municipality.

(b) Agreement. Any two (2) or more public agencies may enter into agreements with each other for joint action pursuant to the provisions of this Act and any two (2) or more municipalities are specially authorized to make such agreement or agreements as they may deem necessary for the joint acquisition and operation of airports, air navigation facilities, or airport hazard areas. Concurrent action by ordinance, resolution or otherwise of the governing bodies of the participating public agencies shall constitute joint action. Each such agreement shall specify its duration, the proportionate interest which each public agency shall have in the property, facilities and privileges involved, the proportion to be borne by each public agency of preliminary costs and costs of acquisition, establishment, construction, enlargement, improvement, and equipment of the airport, air navigation facility, or airport hazard area, the proportion of the

expenses of maintenance, operation, regulation and protection thereof to be borne by each and such other terms as are required by the provisions of this Section. The agreement may also provide for: amendments thereof, and conditions and methods of termination of this agreement; the disposal of all or any of the property, facilities and privileges jointly owned, prior to or upon said property, facilities and privileges, or any part thereof, ceasing to be used for the purposes provided in this Act, or upon termination of the agreement; the distribution of the proceeds received upon any such disposal, and of any funds or other property jointly owned and undisposed of; the assumption or payment of any indebtedness arising from the joint venture which remains unpaid upon the disposal of all assets or upon a termination of the agreement; and such other provisions as may be necessary or convenient.

(c) Joint Board. Public agencies acting jointly pursuant to this Section shall create a joint board which shall consist of members appointed by the governing body of each participating agency. The number to be appointed, their term and compensation, if any, shall be provided for in the joint agreement. Each such joint board shall organize, select officers for terms to be fixed by the agreement, and adopt and amend from time to time rules for its own procedure. The joint board shall have power to plan, acquire, establish, develop, construct, enlarge, improve, maintain, equip, operate, regulate, protect and police any airport, air navigation facility, or airport hazard area to be jointly acquired, controlled and operated, and such board may exercise on behalf of its constituent public agencies all the powers of each with respect to such airport, air navigation facility or airport hazard area, subject to the limitation of Subsection (d) of this Section.

(d) Limitation on Joint Board.

(1) Expenditures. The total expenditures to be made by the joint board for any purpose in any calendar year shall be determined by a budget approved by the governing bodies of its constituent public agencies on or before the preceding December 1st.

(2) Acquisitions Beyond Sums Allotted. No airport, air navigation facility, airport hazard, or real or personal property, the cost of which is in excess of sums therefor fixed by the joint agreement or allotted in the annual budget, may be acquired by the joint board without the approval of the governing bodies of its constituent public agencies.

(3) Eminent Domain. Eminent domain proceedings under this Section may be instituted only by authority of the governing bodies of the constituent public agencies of the joint board. If so authorized, such proceedings shall be instituted in the names of the constituent public agencies jointly, and the property so acquired shall be held by said public agencies as tenants in common until conveyed by them to the joint board.

(4) Disposal of Real Property, Use of Property by Others. The joint board shall not dispose of any airport, air navigation facility or real property under its jurisdiction except with the consent of the governing bodies of its constituent public agencies. However, the joint board may, without such consent, enter into contracts, leases, or other arrangements for the use and occupancy by others of airport lands and personal property for the purposes specified in Section 4 of this Act upon such terms, for such rentals, revenues, and payments, and for such period or periods of years and with such options or renewal, as shall be approved by the joint board. It is provided, however, that if any such contract, lease, or other arrangement shall be for a term, including any renewal or option terms, in excess of 40 years, the same shall be subject to the approval of each of the governing bodies of the constituent public agencies of the joint board unless the necessity for such approval is waived by resolution of each such governing body.

(5) Police Regulations. Any resolutions, rules, regulations, or orders of the joint board dealing with subjects authorized by Section 7 of this Act shall become effective only upon approval of the governing bodies of the constituent public agencies provided that upon such approval, the resolutions, rules, regulations, or orders of the joint

board shall have the same force and effect in the territories or jurisdictions involved as the ordinances, resolution, rules, regulations or orders of each public agency would have in its own territory or jurisdiction.

(6) Taxicab Licensing. A joint airport board established pursuant to this Act shall have power to license taxicabs picking up passengers at or delivering passengers to the airport and to charge and collect fees with respect to the issuance of licenses under this subdivision.

(7) Regulations. Any resolutions, rules, regulations, or orders of the joint board dealing with subjects authorized by Subdivision (6) of this subsection become effective only upon approval of the governing bodies of the constituent public agencies. Upon the approval, the resolutions, rules, regulations, or orders of the joint board have the same force and effect in the territories or jurisdictions involved as the ordinances, resolutions, rules, regulations, or orders of each public agency would have in its own territory or jurisdiction.

* * *

Subsecs. (a) to (c) amended by Acts 1981, 67th Leg., p.852, ch. 300 §2, eff. Aug. 31, 1981;

Subsec. (d) amended by Acts 1983, 68th Leg., p.5322, ch. 978, §1, eff. Sept. 1, 1983;

Subsec. (d)(6),(7) added by Acts 1983, 68th Leg., p.4022, ch. 626 §2, eff. Sept. 1, 1983;

Subsec. (d)(6) amended by Acts 1985, 69th Leg., p.2323, ch. 268, §2, eff. June 5, 1985.